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TRANSMITTAL 15 VOLUME VII CHAPTER Various

FOR THE GUIDE TO JUDICIARY POLICIES AND PROCEDURES

TO: JUDGES, UNITED STATES COURTS OF APPEALS
JUDGES, UNITED STATES DISTRICT COURTS
UNITED STATES MAGISTRATE JUDGES
CIRCUIT EXECUTIVES
FEDERAL PUBLIC/COMMUNITY DEFENDERS
DISTRICT COURT EXECUTIVES
CLERKS, UNITED STATES COURTS OF APPEALS
CLERKS, UNITED STATES DISTRICT COURTS
CHIEF PROBATION OFFICERS
CHIEF PRETRIAL SERVICES OFFICERS
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CIRCUIT LIBRARIANS

FROM:

Leonidas Ralph Mecham



SUBJECT:

Revisions to Appointment of Counsel in Criminal Cases, Volume VII,
Guide to Judiciary Policies and Procedures

This transmittal provides changes to the Appointment of Counsel in Criminal Cases, Volume VII, *Guide to Judiciary Policies and Procedures*. Those changes are detailed below. Questions may be directed to the Defender Services Division, Duty Attorney, on 202-502-3030.

FILING INSTRUCTIONS:

Remove Previous

Insert Attached

Dated

Table of Contents
Page v,vi

Table of Contents
Page v,vi

6/28/02

Chapter VI
Pages i, 5-11

Chapter VI
Pages i, 5-11

6/28/02

Appendix D
Page D-9

Appendix D
D-9

6/28/02

Index
Pages 1-12

Index
Pages 1-12

6/28/02

Change Code:
E = editorial
P = new
policy/procedure
R = revised

Section-by-Section Comparison Chart

Type of Change	Old Information	New Information	Reason for Change
R	<p>Chapter VI- 6.02A(1) <u>Inapplicability of CJA Hourly Rates and Compensation Maximums.</u> (1) <u>Hourly Rates.</u> Pursuant to 21 U.S.C. § 848(q)(10)(A), with respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996, the presiding judicial officer shall set the hourly compensation rate for appointed counsel in an amount not to exceed \$125 per hour for in-court and out-of-court time (unless raised by the Judicial Conference in accordance with section 848(q)(10)(A)).</p> <p>For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, in accordance with 21 U.S.C. § 848(q)(10) prior to that provision's amendment by the Antiterrorism Act, an attorney appointed to represent a defendant charged with a federal capital crime or seeking to vacate or set aside a death sentence in a proceeding under section 2254 or 2255 of title 28, U.S.C., shall be compensated at a rate and in an amount determined exclusively by the presiding judicial officer to be reasonably necessary to obtain qualified counsel to represent the defendant, without regard to CJA hourly rates or compensation maximums.</p>	<p>6.02A(1) <u>Inapplicability of CJA Hourly Rates and Compensation Maximums.</u> (1) <u>Hourly Rates.</u> (a) <u>In General.</u> Pursuant to 21 U.S.C. § 848(q)(10)(A), with respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal was perfected, on or after April 24, 1996, the presiding judicial officer shall set the hourly compensation rate for appointed counsel in an amount not to exceed \$125 per hour for in-court and out-of-court time (unless raised by the Judicial Conference in accordance with section 848(q)(10)(A)).</p> <p>For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, in accordance with 21 U.S.C. § 848(q)(10) prior to that provision's amendment by the Antiterrorism Act, an attorney appointed to represent a defendant charged with a federal capital crime or seeking to vacate or set aside a death sentence in a proceeding under section 2254 or 2255 of title 28, U.S.C., shall be compensated at a rate and in an amount determined exclusively by the presiding judicial officer to be reasonably necessary to obtain qualified counsel to represent the defendant, without regard to CJA hourly rates or compensation maximums.</p>	<p>Revised Policy/Procedure Change</p> <p>This paragraph is amended to provide for automatic annual Employment Cost Index increases to the maximum hourly compensation rate for panel attorneys in capital cases, contingent upon the availability of sufficient funds.</p>

Type of Change	Old Information	New Information	Reason for Change
R Cont'd		<p>6.02A(1) <u>Inapplicability of CJA Hourly Rates and Compensation Maximums.</u></p> <p>(1) <u>Hourly Rates.</u></p> <p>(b) <u>Annual Increase in Hourly Rate Maximum.</u> Subsection 848(q)(10)(A) of the Anti-Drug Abuse Act of 1988 (Title 21, United States Code), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, authorizes the Judicial Conference to increase annually the hourly rate maximum by an amount not to exceed the federal pay comparability raises given to federal employees, beginning three years after the Act's April 24, 1996 effective date. The hourly rate maximum will be adjusted automatically each year in accordance with any federal pay comparability adjustment, contingent upon the availability of sufficient funds. The new rate will apply with respect to services performed on or after the effective date.</p>	<p>Revised Policy/Procedure Change</p> <p>This paragraph is amended to provide for automatic annual Employment Cost Index increases to the maximum hourly compensation rate for panel attorneys in capital cases, contingent upon the availability of sufficient funds.</p>

Type of Change	Old Information	New Information	Reason for Change
R	<p>Appendix D</p> <p><u>25. FAILURE TO COMPLY WITH TERMS AND CONDITIONS:</u> In the event the grantee fails to comply substantially with any of the terms or conditions of the grant award set forth herein, or it is unable to deliver the representation and other services which are the subject of this agreement, the Conference, or its authorized representative, may reduce, suspend, or terminate, or disallow payments under this grant award as it deems appropriate. The Conference, or its authorized representative, shall give notice to the grantee of an intent to reduce, suspend, or terminate payments at least 10 days prior to taking action. Such notice shall indicate the intended action and the reason therefore.</p>	<p>Appendix D</p> <p><u>25. FAILURE TO COMPLY WITH TERMS AND CONDITIONS:</u> In the event the grantee fails to comply substantially with any of the terms or conditions of the grant award set forth herein, or it is unable to deliver the representation and other services which are the subject of this agreement, the Conference, or its authorized representative, may reduce, suspend, or terminate, or disallow payments under this grant award as it deems appropriate. The Conference, or its authorized representative, shall give notice to the grantee of an intent to reduce, suspend, or terminate payments at least 10 days prior to taking action. Such notice shall indicate the intended action and the reason therefor. The Conference reserves the right to pursue all remedies, including, but not limited to, recovery of monetary damages and accrued interest, for grantee's failure to comply with any of the terms and conditions of the grant award or to deliver the representation and other services which are the subject of the agreement.</p>	<p>Revision</p> <p>A sentence at the end of Clause 25 in the grant and conditions agreement for Community Defender Organizations, specifically reserving the right to pursue all remedies following a breach of contract, has been added.</p>

3.12 Transcripts	10
3.13 Fact Witnesses and Depositions	12
3.14 Guardian Ad Litem	13
3.15 Commercial Computer Assisted Legal Research Services	13
3.16 Other Services and Computer Hardware and Software	14
3.17 Reimbursement of Expenses	15

Chapter IV. DEFENDER ORGANIZATIONS

4.01 Statutory Authority	1
4.02 Types of Defender Organizations	2
4.03 Transcripts, Investigative, Expert and Other Services	5
4.04 Assignment of Cases	6
4.05 Apportionment of Cases Between Defender Organizations and the Panel	6
_____ 4.06 Participation as <i>Amicus Curiae</i>	7

Chapter V. MISCELLANEOUS PROCEDURES

5.01 Procedures for the Release of Information Pertaining to Activities Under the Criminal Justice Act and Related Statutes	1
5.02 Annual Report of Attorneys Claiming Compensation for More Than One Thousand Hours	4

Chapter VI. REPRESENTATION IN FEDERAL DEATH PENALTY CASES
AND IN FEDERAL CAPITAL HABEAS CORPUS PROCEEDINGS

6.01 Appointment of Counsel in Capital Cases	1
6.02 Compensation of Appointed Counsel in Capital Cases	5
6.03 Authorization and Payment for Investigative, Expert and Other Services in Capital Cases	9

<u>Appendix A</u> - Criminal Justice Act Forms	A-1
<u>Appendix B</u> - Location Codes	B-1
<u>Appendix C</u> - Suggested Form for Advance Authorization for Investigative, Expert or Other Services	C-1
Model Order Authorizing the Acquisition of Computer [Hardware and/or Software] Under the Criminal Justice Act	C-3
<u>Appendix D</u> - Community Defender Organization: Grant and Conditions	D-1
<u>Appendix E</u> - Interim Payments to Counsel	
In non-death penalty cases	E-1
In death penalty cases	E-7
<u>Appendix F</u> - Interim Payments for Services Other than Counsel	
In non-death penalty cases	F-1
In death penalty cases (commenced or appeal perfected <u>before</u> 4/24/96)	F-6
In death penalty cases (commenced or appeal perfected <u>on or after</u> 4/24/96)	F-10
<u>Appendix G</u> - Model Criminal Justice Act Plan	G-1
Model Plan for the Composition, Administration and Management of the Panel of Private Attorneys under the Criminal Justice Act	G-12
<u>Appendix H</u> - Insanity Defense Reform Act of 1984	H-1
<u>Appendix I</u> - Federal Death Penalty Cases	I-1
Recommendations adopted by the Judicial Conference, and accompanying commentary, from the report of the Defender Services Committee's Subcommittee on Federal Death Penalty Cases entitled, <i>Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation</i>	I-1

**Chapter VI. REPRESENTATION IN FEDERAL DEATH PENALTY CASES AND IN
FEDERAL CAPITAL HABEAS CORPUS PROCEEDINGS**

CONTENTS

	<u>PAGE</u>
_____ 6.01 Appointment of Counsel in Capital Cases	1
6.02 Compensation of Appointed Counsel in Capital Cases	5
6.03 Authorization and Payment for Investigative, Expert and Other Services in Capital Cases	9

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proceedings, applications for stays of execution, competency proceedings, proceedings for executive or other clemency, and other appropriate motions and proceedings.

6.02 Compensation of Appointed Counsel in Capital Cases.

A. Inapplicability of CJA Hourly Rates and Compensation Maximums.

(1) Hourly Rates.

(a) In General. Pursuant to 21 U.S.C. § 848(q)(10)(A), **with respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal was perfected, on or after April 24, 1996**, the presiding judicial officer shall set the hourly compensation rate for appointed counsel in an amount not to exceed \$125 per hour for in-court and out-of-court time (unless raised by the Judicial Conference in accordance with section 848(q)(10)(A)).

For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, in accordance with 21 U.S.C. § 848(q)(10) prior to that provision's amendment by the Antiterrorism Act, an attorney appointed to represent a defendant charged with a federal capital crime or seeking to vacate or set aside a death sentence in a proceeding under section 2254 or 2255 of title 28, U.S.C., shall be compensated at a rate and in an amount determined exclusively by the presiding judicial officer to be reasonably necessary to obtain qualified counsel to represent the defendant, without regard to CJA hourly rates or compensation maximums.

(b) Annual Increase in Hourly Rate Maximum. Subsection 848(q)(10)(A) of the Anti-Drug Abuse Act of 1988 (Title 21, United States Code), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, authorizes the Judicial Conference to increase annually the hourly rate maximum by an amount not to exceed the federal pay comparability raises given to federal employees, beginning three years after the Act's April 24, 1996 effective date. The hourly rate maximum will be adjusted automatically each year in accordance with any federal pay comparability adjustment, contingent upon the availability of sufficient funds. The new rate will apply with respect to services performed on or after the effective date.

- (2) Inapplicability of Compensation Maximums. There is neither a statutory case compensation maximum for appointed counsel nor provision for review and approval by the chief judge of the circuit of the case compensation amount in capital cases.

B. Attorney Compensation Recommendation.

- (1) In the interest of justice and judicial and fiscal economy, and in furtherance of relevant statutory provisions regarding qualifications of counsel in capital cases (see paragraph 6.01 C), presiding judicial officers are urged to compensate counsel at a rate and in an amount sufficient to cover appointed counsel's general office overhead and to ensure adequate compensation for representation provided.

In consideration of the potential for wide disparity in compensation paid to attorneys in federal death penalty cases and in federal capital habeas corpus proceedings, and for overburdening the Defender Services appropriation, it is recommended that presiding judicial officers limit the hourly rate for attorney compensation to between \$75 and \$125 per hour for in-court and out-of-court time. **With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996,** the rate of compensation shall not exceed \$125 per hour for in-court and out-of-court time (unless revised by the Judicial Conference in accordance with 21 U.S.C. § 848(q)(10)(A)).

- (2) If, following the appointment of counsel in a case in which a defendant was charged with an offense that may be punishable by death, it is determined that the death penalty will not be sought, the court may consider the question of the number of counsel needed and the rate of compensation needed for the duration of the proceeding. After considering whether the number of counsel initially appointed is necessary to ensure effective representation or to avoid disruption of the proceeding, the court may continue such appointments or make an appropriate reduction. After considering the need to compensate appointed counsel fairly, taking into account the commitment of time and resources appointed counsel has made and will continue to make, the court may continue to pay the rate previously approved or prospectively reduce such rate.

- C. Interim Payments to Counsel. It is urged that the court permit interim payment of compensation in capital cases. (See generally paragraph 2.30 B concerning interim payments to counsel in death penalty cases.)
- D. Forms. Claims for compensation and reimbursement of expenses for attorneys furnishing services in death penalty proceedings should be submitted on CJA Form 30, "Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel."
- E. Review of Vouchers. Absent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission.
- F. Case Budgeting in Federal Capital Habeas Corpus Proceedings and Federal Death Penalty Cases. Courts are encouraged to require appointed counsel to submit a proposed initial litigation budget for court approval that will be subject to modification in light of facts and developments that emerge as the case proceeds. Case budgets should be submitted *ex parte* and filed and maintained under seal.
- (1) The budget should serve purposes comparable to those of private retainer agreements by confirming both the court's and the attorney's expectations regarding fees and expenses.
 - (2) Consideration should be given to employing an *ex parte* pretrial conference in order to facilitate reaching agreement on a litigation budget at the earliest opportunity.
 - (3) The budget should be incorporated into a sealed initial pretrial order that reflects the understandings of the court and counsel regarding all matters affecting counsel compensation and reimbursement and payments for investigative, expert and other services, including but not limited to the following matters:
 - (a) The hourly rate at which counsel will be compensated (see paragraphs 6.02 A and B);
 - (b) In capital habeas corpus cases: the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) for the entire case (in its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time);

(c) In federal death penalty cases:

- i. Prior to prosecution decision to seek death penalty authorization: the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the time that the Department of Justice determines whether to authorize the death penalty;
- ii. After prosecution decision to seek death penalty authorization: the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the guilt and penalty phases of the trial (in its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time);
- iii. Death penalty not sought: as soon as practicable after a decision not to seek the death penalty, the number of appointed counsel and hourly rate of compensation should be reviewed in accordance with subparagraph 6.02 B(2);

(d) Agreement that counsel will advise the court of significant changes (counsel, expert, investigative, and other) to the estimates contained in the order;

(e) Agreement on a date on which a subsequent *ex parte* case budget pretrial conference will be held;

(f) Procedure and schedules for submission, review, and payment of interim compensation vouchers (see paragraphs 6.02 C and E);

(g) The form in which claims for compensation and reimbursement should be submitted (see paragraph 6.02 D) and the matters that those submissions should address; and

(h) The authorization and payment for investigative, expert, and other services (see paragraph 6.03).

- (4) An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized. Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.

- G. Case Management in Federal Capital Habeas Corpus Proceedings. Judges are encouraged to employ the case-management techniques used in complex civil litigation to control costs in federal capital habeas corpus cases.

6.03 Authorization and Payment for Investigative, Expert and Other Services in Capital Cases.

- A. In General. **With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996,** upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court should authorize the defendant's attorneys to obtain such services. No *ex parte* request for investigative, expert, or other services in such cases may be considered unless, a proper showing is made by counsel concerning the need for confidentiality.

For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, in accordance with 21 U.S.C. § 848(q)(9) prior to that provision's amendment by the AEDPA, upon a finding in *ex parte* proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the presiding judicial officer shall authorize the defendant's counsel to obtain such services on behalf of the defendant.

For all capital cases, upon a finding that timely procurement of necessary investigative, expert or other services could not await prior authorization, the presiding judicial officer may authorize such services *nunc pro tunc* consistent with paragraph 3.02 B.

Except as otherwise specified in paragraph 6.03, the provisions set forth in Chapter III are applicable to the authorization and payment for investigative, expert, and other services in capital cases.

- B. AEDPA Limitation: Inapplicability to Pre-AEDPA Cases. For all capital cases, the compensation maximum set forth in paragraph 3.02 A of these guidelines is inapplicable.

With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996, pursuant to 21 U.S.C. § 848(q)(10)(B), the fees and expenses for investigative, expert, and other services are limited to \$7,500 in any case unless payment in excess of that

amount is certified by the court, or magistrate judge if the services were rendered in connection with a case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit (or an active circuit judge to whom the chief judge has delegated this authority). The \$7,500 limit applies to the total payments for investigative, expert, and other services in a case, not to each service individually.

Once payments for investigative, expert, and other services total \$7,500, then additional payments must be approved by the chief judge of the circuit (or an active circuit judge to whom the chief judge has delegated this authority). Accordingly, the court shall monitor all payments for investigative, expert, and other services.

If it can be anticipated that the payments for investigative, expert, and other services will exceed the statutory maximum, advance approval should be obtained from the court and the chief judge of the circuit (or an active circuit judge to whom the chief judge has delegated this authority). See sample form, Appendix C. Rather than submitting multiple requests, where possible, courts should submit the expert, investigative and other services portion of the approved case budget (see paragraph 6.02 F) to the chief judge of the circuit (or his or her designee) for advance approval.

For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, in accordance with 21 U.S.C. § 848(q)(10) prior to that provision's amendment by the AEDPA, the presiding judicial officer shall set compensation for investigative, expert, and other services in an amount reasonably necessary to obtain such services, without regard to CJA or AEDPA maximum limitations.

- C. Consulting Services in Federal Capital Habeas Corpus Cases and in Federal Death Penalty Cases. Where necessary for adequate representation, subsection (e) of the CJA and 21 U.S.C. § 848(q)(9) authorize the reasonable employment and compensation of expert attorney consultants to provide “light consultation” services to appointed and *pro bono* lawyers in federal capital habeas corpus cases and in federal death penalty cases in such areas as records completion, determination of need to exhaust state remedies, identification of issues, review of draft pleadings and briefs, authorization process to seek the death penalty, etc. “Light consultation” services are those that a lawyer in private practice would typically seek from another lawyer who specializes in a particular field of law, as opposed to “heavy consultation” services, which include, but are not limited to, reviewing records, researching case-specific legal issues, drafting pleadings, investigating claims, and providing detailed case-specific advice to counsel, if such tasks take a substantial amount of time.

An expert attorney consultant shall not be paid an hourly rate exceeding that which an appointed counsel could be authorized to be paid.

Courts may wish to require that an appointed counsel who seeks to have the court authorize the services of an expert attorney consultant confer with the federal defender, or the Administrative Office's Defender Services Division if there is no federal defender in the district or if the federal defender has a conflict of interest, regarding who could serve as an expert attorney consultant.

- D. Interim Payments to Persons Providing Investigative, Expert and Other Services. It is urged that the court or magistrate judge permit interim payment of compensation in capital cases.

With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996, 21 U.S.C. § 848(q)(10)(B), as amended, provides a \$7,500 payment maximum for the total cost of fees and expenses for investigative, expert, and other services. A special set of procedures for effecting interim payments, including a special memorandum order, must be used in these cases. These procedures and a sample memorandum order are set forth in Appendix F, beginning on page F-11. (See also the case budgeting techniques recommended in paragraph 6.02 F.) Other interim payment arrangements which effectuate a balance between the interest in relieving service providers of financial hardships and the practical application of the statutorily imposed responsibility of the chief judge of the circuit to provide a meaningful review of claims for excess payment may be devised in consultation with the Defender Services Division of the Administrative Office of the United States Courts.

For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996, there are no expert services maximums. A separate set of procedures for effecting interim payments, including a separate memorandum order, must be used in those cases. These procedures and sample memorandum order are set forth in Appendix F, beginning on page F-7.

- E. Forms. Claims for compensation and reimbursement of expenses for investigative, expert or other services in death penalty proceedings should be submitted on CJA Form 31, "Death Penalty Proceedings: *Ex Parte* Request for Authorization and Voucher for Expert and Other Services."
- F. Review of Vouchers. Absent extraordinary circumstances, judges should act upon claims for compensation for investigative, expert, or other services within 30 days of submission.

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25. FAILURE TO COMPLY WITH TERMS AND CONDITIONS: In the event the grantee fails to comply substantially with any of the terms or conditions of the grant award set forth herein, or it is unable to deliver the representation and other services which are the subject of this agreement, the Conference, or its authorized representative, may reduce, suspend, or terminate, or disallow payments under this grant award as it deems appropriate. The Conference, or its authorized representative, shall give notice to the grantee of an intent to reduce, suspend, or terminate payments at least 10 days prior to taking action. Such notice shall indicate the intended action and the reason therefor. The Conference reserves the right to pursue all remedies, including, but not limited to, recovery of monetary damages and accrued interest, for grantee's failure to comply with any of the terms and conditions of the grant award or to deliver the representation and other services which are the subject of the agreement.

DATE

AUTHORIZED REPRESENTATIVE OF GRANTEE

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INDEX

	<u>Chapter/Page</u>
Accelerated Transcript	III-10
Alternative hourly rates for counsel:	
Annual increase of	II-14
Authority for	I-3; II-12
Factors to be considered	II-13,14
General considerations	II-13
Procedures for requesting	II-14
<i>Amicus Curiae</i> participation of federal public and community defenders in federal court	IV-7
Ancillary matters:	
Compensation limit	II-18
Definition of	II-5,6
<i>Ex parte</i> application	II-6
Preliminary determination	II-6
Scope of representation	I-3; II-6
Appeals:	
Bail appeals	II-10
Compensation limit	II-16-18
Filing fees	I-7; II-23
Interlocutory appeals	II-10
New appointment	II-10
Writ of certiorari	II-23
Appointment/Evaluation of federal public defender and staff	I-9,10; IV-2-4
Appointments (see also Cases covered/not covered by the Act):	
Appointment of co-counsel	II-9
Death penalty cases	I-11,12; VI-1,2; App. I
Appointment of counsel to represent more than one individual in a particular case	II-9
Continuity of representation	II-9,10
Federal death penalty cases and federal capital habeas corpus proceedings	I-11-14; VI-1-11; App. I
Federal defender organizations	I-2; II-3

Appointments (continued):

Forms for	II-7,11; App. A
New appointment, when made	II-10
Out-of-district attorney	II-3
<i>Pro hac vice</i> admission to panel	II-3
Standby counsel	II-11
Substitution of counsel	I-3; II-20
Termination of	II-11
Transfer of case to another district	II-10
Under 18 U.S.C. § 983 (b)(1) in certain judicial civil forfeiture proceedings	I-14; II-7
Waiver of counsel	I-2; II-11
Arrested person	I-1; II-1
Assets, duty to disclose client's	II-3
Associates of appointed counsel	II-9
Bail appeals	II-10
Bar associations, attorneys furnished by	I-2; II-3
Briefs, printing of	II-23
Capital cases	I-11-14; VI-1-11; App. I
Case budgeting in federal capital habeas corpus proceedings and federal death penalty cases	VI-7,8; App. I
Cases covered by the Act (see also Compensation limits):	
Ancillary matters	I-3; II-5,6
Appeals	II-10
Arrest	I-1; II-1
Bail appeals	II-10
Judicial civil forfeiture proceedings under 18 U.S.C. § 981 (b)(1) (certain proceedings)	I-14; II-7
Civil forfeiture proceedings (ancillary matters) pursuant to 21 U.S.C. § 881, 19 U.S.C. § 1602, or similar statutes	II-6
Civil or criminal contempt with loss of liberty	I-1; II-5
Deferred prosecution (pretrial diversion)	II-5

Cases covered by the Act (continued):

Extraordinary writs	II-10
Felony	I-1; II-1
Grand jury witness	II-5
Habeas corpus	I-2; II-2,10; VI-1,2,5-11
International extradition	II-5
Juvenile delinquency	I-1; II-1
Material witness in custody	I-1; II-2
Mental condition proceeding	I-1; II-2,10
Misdemeanor	I-2; II-1,2
Narcotic Addict Rehabilitation Act	I-1; II-2
Parole proceedings	I-1; II-1
Petty offense with confinement authorized	I-2; II-2
Pretrial diversion	II-5
Prisoner transfer proceedings under chapter 306 of title 18	I-1; II-2,16; Section B
Probation violation	I-1; II-1
Proceedings under 18 U.S.C. §4106A (see also: Parole proceedings)	I-4; II-16
Sixth Amendment requirement	I-1; II-2
Standby counsel	II-11
Supervised Release	I-1; II-1
Witnesses before a grand jury, court, Congress, or federal agency or commission	II-5

Cases not covered by the Act:

Civil actions to protect jurors' employment	II-4
Civil rights cases by prisoners	II-4
Corporate defendant cases	II-4
Deportations, administrative proceedings before INS.	II-4
Guardian ad litem	III-13
Petty offense with no confinement authorized	II-4

Certiorari, writ of II-23

Civil actions to protect jurors' employment II-4

Civil forfeiture proceedings (ancillary matters)
pursuant to 21 U.S.C. § 881, 19 U.S.C. § 1602,
or similar statutes II-6

Civil rights cases by prisoners II-4

Claims (see Compensation claims)

Claims (see Suits alleging malpractice or negligence
in furnishing representational services)

Community defender organizations I-10; II-12; IV-5

Compensation claims for counsel (see also

Investigative, expert and other services):

Approval by magistrate judges II-19

Associates of appointed counsel II-9

Case budgeting and management in federal capital

habeas corpus proceedings and federal death penalty cases VI-7-9; App. I

Excess claims I-4; II-18,19

Expenses (see Expenses)

Forms for payment II-7,11; App. A

Hourly rates I-3,4; II-12

Alternative hourly rates I-3; II-12-15

Authority for annual increases I-3; II-14,15

Death penalty cases I-12; VI-5,6; App. I

Interim payment II-23,24; App. E; App. F

Death penalty cases II-23,24; VI-7; App. E; App. F

Judicial civil forfeiture proceedings under

18 U.S.C. § 983 (b)(1) I-14; II-7

Limits on amount (see Compensation limits)

Memorandum in support of claim II-18,19

Multiple indictments II-20

Out-of-pocket expenses (see Expenses)

Proration of claims II-20

Reduction of claims II-19

Standby counsel II-11

Substitution of counsel II-20

Time limits for submission of claims II-12

Travel time and expenses II-20,21

Compensation limits for counsel:

Ancillary matters II-18

Appeals I-4; II-16,17

Civil or criminal contempt with

loss of liberty II-17

Death penalty cases II-15,23,24; VI-5; App. I

Deferred prosecution (pretrial diversion) II-16

Felony II-16

Compensation limits for counsel (continued):

Grand jury witness	II-17
Habeas corpus	II-17
International extradition	II-18
Judicial civil forfeiture proceedings	
under 18 U.S.C. § 983 (b)(1)	I-14; II-16
Material witness in custody	II-17
Mental condition proceedings	II-17; App. H
Misdemeanor	II-16
Other representations	II-17,18
Parole violation or revocation	II-17
Petty offense	II-16
Pretrial diversion	II-16
Prisoner transfer proceedings under	
18 U.S.C. §4106A, 4107 and 4108	II-16
Probation violation	II-17
Proceedings under 18 U.S.C. §4106A	I-4; II-16
Standby counsel	II-11
Witnesses before a grand jury, court, Congress,	
or federal agency or commission	II-17

Compensation of federal public defender and staff	IV-2
---	------

Computer-assisted legal research:

Performed by appointed counsel	II-24
Performed by commercial legal research firm	III-13

Computer hardware and/or software:

Application to court to acquire with CJA funds	III-14
Consultation with Defender Services Division	III-14
Model order authorizing acquisition of	App. C

Computer systems and automation litigation support

 personnel and experts:

Application to court to acquire with CJA funds	III-14
Consultation with Defender Services Division	III-14

Consulting services in federal capital

habeas corpus proceedings and federal capital prosecutions	VI-10,11
--	----------

Contempt, civil or criminal	II-5,17
-----------------------------------	---------

Continuity of representation	II-9,10
Corporate defendant cases	II-4
Court of appeals:	
Compensation limit	I-4; II-16-18
Filing fee	I-6; II-23
New appointment	II-10
Writ of certiorari	II-23
Court reporters and reporting services	III-10,11
Criminal Justice Act panel (see also District plans):	
Administration, composition and management	I-2; II-3,4
Distribution of appointments	II-4
Model Plan for	App. G
Out-of-district attorney, admission of	II-3
<i>Pro hac vice</i> admission to	II-3
<i>Criminal Monetary Penalties: A Guide to the Probation Officer's Role,</i> Monograph 114, Chap. VI	II-1
Death penalty federal habeas corpus and federal capital cases	I-11-14; VI-1-11; App. I
Defender organizations:	
Assignment of cases to	I-2; II-3; IV-6
Assistance to <i>pro se</i> litigants	III-2
Expert and other services	IV-5,6
Statutory authority for	I-9; IV-1
Types of	
Community defender organizations	I-10; IV-5
Federal public defender organizations	I-9,10; IV-1-4
Deferred prosecution (pretrial diversion)	II-5,16
Delegation of excess compensation	
approval authority	I-4; II-18; III-2
Death penalty cases	I-13; VI-9,10
Deportation, administrative proceedings before INS	II-4

Depositions:

Expert witnesses	III-12
Fact witnesses	III-12

Disclosure of client's financial status	II-3
---	------

Disclosure of payment information	I-5,6,14; V-1-4, App. A
---	-------------------------

District plans:

Advance authorization by court to incur expenses	II-20
Duty to disclose client's assets	II-3
Model CJA Plan	II-1,4; App. G
Model Plan for CJA Panel	II-4; App. G
Modification of	I-2
Option for attorneys furnished by bar association or legal aid agency	I-2; II-3
Option for attorneys furnished by defender organization	I-2; II-3
Provision for private attorneys	I-2; II-3
Requirement for	I-1; II-1
Standard forms	II-7

Doubts about eligibility	II-8
--------------------------------	------

Dual purpose examinations	III-6,7
---------------------------------	---------

Eligibility:

Defendant's financial status as contained on CJA Form 23	II-7; App. A
Determination by federal judge or magistrate judge	II-7
Doubts about	II-8
Erroneous determination	II-8
Fact-finding by other officers of the court	II-7,8
Family's financial status	II-9
Partial	II-8; III-1
Reimbursement from defendant	I-3,8; II-8,19
Standard for	II-8
U.S. Attorney and law enforcement officers	II-7

<i>Ex parte</i> applications in ancillary matters	II-6
---	------

<i>Ex parte</i> applications for services other than counsel	I-7; III-3
Death penalty cases	I-13; VI-9
Excess compensation claims	I-4,8; II-19,20; III-2; App. A; App. E; App. F
Death penalty cases	I-13; VI-9,10; App. A; App. E; App. F
Expenses:	
Advance authorization to incur	II-20
Computer assisted legal research	II-24,25; III-13
Defending actions alleging CJA panel attorney malpractice	I-3,4
Depositions	III-12
Experts (see Investigative, expert and other services)	
Fact witnesses	III-12
Forms for reimbursement	II-12; III-3; App. A
Interim reimbursement	II-22-24; III-4; App. E; App. F
Law student research	II-24
Non-reimbursable items	
Filing fees	II-23
General office overhead	II-23; III-14
Items of a personal nature	II-23
Printing of briefs	II-23
Service of process	II-23
Reimbursable out-of-pocket	II-21,22
Transcript costs	II-21; III-10,11
Travel expenses	II-21,22
Expert and other services (see Investigative, expert and other services)	
Expert witnesses:	
Depositions	III-12
Expenses of	III-2,12,14
Extradition	II-5,18
Extraordinary writs	II-10
Fact witnesses:	
Depositions	III-12
Fees and expenses of	III-12
Fact-finding for eligibility	II-7,8

Family's financial status	II-9
Federal death penalty cases and federal capital habeas corpus proceedings	I-11-14; VI-1-11; App. I
Federal death penalty resource counsel	App. I
Federal defender organizations (see Defender organizations)	
Felony charge	I-1; II-1,16
Filing fees	II-23
Financial eligibility (see Eligibility)	
Financial status:	
Defendant's	II-7,8
Family's	II-9
Forms:	
Appointment of and Authority to Pay Court Appointed Counsel (CJA 20)	II-12; App. A
Authorization and Voucher for Expert and Other Services (CJA 21)	III-3; App. A
CJA Forms list	App. A
Compensation and reimbursement of expenses of	
Counsel (CJA 20)	II-12,21; App. A
Expert and other services (CJA 21)	III-3; App. A
Death Penalty Proceedings:	
Appointment of and Authority to Pay Court Appointed Counsel (CJA 30)	App. A
<i>Ex Parte</i> Request for Authorization and Voucher for Expert and Other Services (CJA 31)	App. A
Excess compensation claim, supplemental information statement:	
district court (CJA 26)	App. A
appeals court (CJA 27)	App. A
Financial Affidavit (CJA 23)	App. A
Public disclosure of attorney fee information, notice to court-appointed counsel of (CJA 19)	V-1-4; App. A
Standard forms	II-7; App. A
Termination of appointment (CJA 7)	II-11; App. A
Transcripts (CJA 24)	II-21; App. A

Freedom of Information Act (not applicable to CJA information)	V-1
Grand jury witness representation	II-5,17
Grant and Conditions	
Community defender organization	App. D
Gross Receipts Taxes (see Taxes)	
Guardian ad litem	III-13
Habeas corpus cases	
Death penalty cases	I-11-14; VI-1-11; App. I
Generally	I-2; II-2,10
Hourly rates	I-3; II-12-15
Alternative hourly rates	I-3; II-12-15
Annual increases	I-3; II-14,15
Capital Cases	I-13; VI-5,6; App. I
Information (procedures for release of)	V-1-4
Interim Payments:	
Generally	
To counsel	II-24; App. E
To experts	III-4; App. F
Capital Cases	
To counsel	II-24; VI-7; App. E
To experts	III-4; VI-11; App. F
Interlocutory appeals	II-10
International extradition	II-5,18
Investigative, expert and other services:	
Advance authorization to incur	I-7; III-2
Availability to persons with retained counsel	III-1
Availability to <i>pro se</i> litigants	III-1,2
Case budgeting and management in federal capital habeas corpus	
proceedings and federal death penalty cases	VI-7,8; App. I
Claims for payment	III-3
Computer assisted legal research	III-13

Investigative, expert and other services (continued):

Computer hardware and/or software

Application to court to acquire with CJA funds III-14

Consultation with Defender Services Division III-14

Model order authorizing acquisition of App. C

Computer systems and automation litigation support

personnel and experts

Application to court to acquire with CJA funds III-14

Consultation with Defender Services Division III-14

Consulting services in death penalty cases VI-10,11

Ex parte application I-7; III-3

Death penalty cases I-13; VI-9

Excess compensation claims I-8; III-2

Death penalty cases I-13,14; VI-9,10

Expenses III-2,12,14

Extraordinary office overhead III-14

Forms for payment III-3; App. A

Interim payments III-4; App. F

Death penalty cases III-4; VI-11; App. F

Investigators III-5

Limits on amount I-8,13,14; III-2,3; VI-9,10

Nunc pro tunc authorization I-8; III-3

Death penalty cases VI-9

Psychiatrists, psychologists III-5-9

Transcripts II-21; III-10,11

Investigators:

Expenses of III-14

Policies regarding III-5

Jurors, civil actions to protect

employment II-4

Juvenile delinquency cases I-1; II-1

Law student assistants II-24

Legal aid agency, attorneys furnished by I-2; II-3

Legal research by law students (see also

Computer-assisted legal research) II-24

Limits on compensation (see Compensation limits)

Magistrate judges:

Approval of compensation claims	I-7,8,13,14; II-19
Reimbursement of expenses in defending actions alleging CJA panel attorney malpractice	I-4

Malpractice or negligence claims:

Federal defender employees furnishing representational services	I-10,11
CJA panel attorneys furnishing representational services	I-3,4

Material witness representation	I-1; II-2,17
---	--------------

Memorandum in support of claim	II-18,19
--	----------

Mental condition proceedings:

Appointment of counsel	I-1; II-2,10
Compensation limit for Counsel	II-17; App. H
Experts	III-2,3
Dual purpose examinations	III-6,7
Procedures for payment of experts	III-5,6
Psychiatrists, psychologists	III-5-9
Source of payment for experts	III-5-9
Types of examinations	III-5-9

Misdemeanor charge	I-1,2; II-1,2,16
------------------------------	------------------

Model CJA plan	II-1,4; App. G
--------------------------	----------------

Model order authorizing acquisition of computer

hardware and/or software	App. C
------------------------------------	--------

Model Plan for CJA panel	II-4; App. G
------------------------------------	--------------

Multiple indictments	II-20
--------------------------------	-------

Narcotic Addict Rehabilitation Act (NARA)	II-2
---	------

New trial	II-10
---------------------	-------

Non-reimbursable expenses (see Expenses)

Notarial services	III-12,14
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